(31) (28)

Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR GOVERNMENTAL REFORM, INC., FRANK GILBERT, GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
Petitioners,

v.

RAY THORNTON, *et al.*,
Respondents.

WINSTON BRYANT,
ATTORNEY GENERAL OF ARKANSAS,
Petitioner,

v.

BOBBIE E. HILL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Arkansas

REPLY BRIEF FOR PETITIONERS U.S. TERM LIMITS, INC., *et al.*

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I. THIS COURT HAS NEVER INVALIDATED STATE BALLOT REGULATIONS UNDER ARTICLE I.

At issue is not "term limits," but a particular state constitutional provision—section 3 of Amendment 73 to the Constitution of Arkansas, enacted directly by vote of the people of that State. It provides, prospectively only, that after a person has served specified periods in the House or Senate, that person's name will no longer appear on the printed election ballot for those respective offices. But Amendment 73 does not prevent anyone from campaigning for those offices; from being elected; from filling a vacancy; or from serving. P.C.A. 15a. It is, in short, a restriction of "ballot access."

States have determined which names are printed on congressional election ballots for as long as States have printed ballots. They have kept candidates from the ballot based on, for example, past political affiliation or current officeholding or employment. Some such laws may or may not, depending on their purpose and effect, be held by the courts to deny rights guaranteed by the First and Fourteenth Amendments. And all such state laws are constantly subject to the opportunity and authority of Congress to revise or reject them, as expressly provided in Article I, § 4, of the Constitution.

Respondents, however, have chosen not to press a Fourteenth Amendment claim.[1] Instead, they seek to break new ground: to hold that without regard to the Fourteenth Amendment, some state ballot and election laws are now to be labeled as "qualifications," and on that basis be held to violate Article I. Until this year no ballot regulation had ever been invalidated on that theory, and the idea that ballot restrictions are to be reviewed under Article I has been repeatedly rejected. Respondents have shown no "special justification" for abandoning that settled rule. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984).

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[1] See Th. Br. i; Hill Br. i; S.G. Br. i. *Cf. Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *United States* v. *Erika, Inc.*, 456 U.S. 201, 211 n.14 (1982). The Supreme Court of Arkansas did not decide whether § 3 violated the Fourteenth Amendment.

A. *Storer* v. *Brown* Rejected Respondents' Article I Argument.

In *Storer* v. *Brown*, 415 U.S. 724 (1974), two candidates for Congress challenged a California law that excluded their names from the ballot because of their prior political affiliation.[2] They argued for 30 pages that the California ballot laws "violate Article I, Section 2, Clause 2 of the United States Constitution by adding qualifications for the Office of the United States Congress." Brief of Appellants, No. 72-812, O.T. 1972, at 34-63. This Court responded with a holding emphatic enough to settle that point once and for all: "The argument is wholly without merit." 415 U.S. at 746 n.16. The ballot exclusion based on prior political affiliation, this Court held, "no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary." *Id.*

B. Respondents Seek To Substitute Article I for the Fourteenth Amendment.

Weighing the constitutionality of state ballot-access laws is something this Court does regularly—not under Article I, but rather to decide whether they are so irrational or invidiously discriminatory that they violate the Fourteenth Amendment, including the First Amendment principles it incorporates. *E.g.*, *Storer* v. *Brown*, *supra*; *Norman* v. *Reed*, 502 U.S. 279 (1992); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). The Fourteenth Amendment is quite capable of handling the imaginative "nightmares," Hill Br. 34 (Congress restricted to lawyers, etc.), that respondents posit.

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[2] The Solicitor General incorrectly states that "no candidate was prevented from *entering* the race to gain a spot on the general election ballot." S.G. Br. 20 (emphasis in original). Because of prior affiliation, the *Storer* plaintiffs were completely barred from entering any party primary or seeking a ballot spot as an independent. The California law in *Storer* "was an absolute bar to attaining a ballot position." *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195 (1986).

To borrow an antique but apt phrase, respondents' claim "sounds in" the Fourteenth Amendment, not Article I. They do not deny state power to regulate ballots; instead, they complain it has been misused to treat them unequally. Respondents complain, for example, that Amendment 73 unfairly denies longtime officeholders an advantage allowed some others. Hill Br. 38. They say Amendment 73 "does not deal rationally;" that there is "no reason" for it to begin at six years in the House or twelve in the Senate; that it is inadequately "calibrate[d]." Hill Br. 31. They call it discriminatory. Hill Br. 37-38.

But all these are First and Fourteenth Amendment considerations; and the cases respondents cite are First and Fourteenth Amendment cases.[3] Respondents also say Amendment 73 violates Article I because of its "purpose and effect"—another concept familiar in First and Fourteenth Amendment jurisprudence. Even in Fourteenth Amendment discrimination cases, "purpose" becomes relevant only to explain a demonstrable "effect." See *Washington* v. *Davis*, 426 U.S. 229, 244-45 (1976); *cf. Lassiter* v. *Northampton County Bd.*, 360 U.S. 45, 50-51 (1959). And the "effect" respondents allege—practical impossibility of election—is simply not shown by the record. See pp. 7-9, *infra*.

Respondents would transform Article I into something resembling the Fourteenth Amendment, but escaping all the Fourteenth Amendment decisions that are so unfavorable to them.[4] Respondents complain, for instance,

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[3] In fact, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), *Lane* v. *Wilson*, 307 U.S. 268 (1939), and *Guinn* v. *United States*, 238 U.S. 347 (1915), all quoted by the Solicitor General, S.G. Br. 23, were Fifteenth Amendment discrimination cases.

[4] Fourteenth Amendment challenges even to state laws that flatly limit terms or tenure of state officials have been consistently rejected. See P.C.A. 19a-20a; *Moore* v. *McCartney*, 425 U.S. 946 (1976) (no substantial federal question); *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991); USTL Br. 22. And Amendment 73 "in no way depend[s] upon political affiliation or political viewpoint." *Clements* v. *Fashing*, 457 U.S. 957, 965 (1982) (opinion of Rehnquist, J.).

of "hobb![ing]." Hill Br. 4. Fourteenth Amendment analysis would not stop there, but would look at the whole picture, to consider also the State's interests, including responsive representation and fairness, and to balance the extent to which "hobbled" racers had, to continue the metaphor, been supplied with stimulants that others were denied.[5] Under the Fourteenth Amendment, "constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test.'" *Anderson* v. *Celebrezze, supra*, 460 U.S. at 789. Yet by invoking Article I, respondents say, they can dismiss consideration of the governmentally-conferred advantages of incumbents as "frivolous." Hill Br. 31.

C. Respondents' Open-Ended Definition of "Qualifications" Is Unmanageable and Contrary to Precedent.

Respondents argue that a state election law violates Article I whenever it "establishes an additional, and thus unconstitutional qualification." Th. Br. 5. They say a "qualification" is to be identified by a "standard" based on "essential democratic principles," Th. Br. 6, or "important democratic principles," *id.* at 36—which they argue call for rejection of the choice of 60% of the voters of Arkansas.[6] As used by respondents, "qualification" states a conclusion, not a test.

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[5] For a former ten-term Representative's summary of his governmentally-conferred advantages, see State of Wash. Br. A1-A15. In the November 8, 1994 congressional elections, with a few prominent exceptions, incumbents who ran overwhelmingly succeeded. Of 385 House members seeking reelection, 348 (90%) won and two districts (both with first-term incumbents) are undecided; 17 of the 35 losers were in their first term, 2 in their second. Of 26 Senate incumbents running, 24 (92%) won.

[6] The Hill respondents invent their own elastic definition of "qualification": a characteristic "that will *almost always* be required *as a practical matter* to achieve a desired office." Hill Br. 30 (emphasis supplied). Finding even that too restrictive, they propose a test that is totally circular: "whether the Measure violates the principle that the qualifications 'fixed in the Constitution' may not be supplemented." *Id.*

As Special Chief Justice Cracraft concisely summarized the long-accepted understanding, "a person is qualified within the meaning of Article I of the United States Constitution if permitted to serve if elected." P.C.A. 37a (dissenting opinion). In addition to *Storer* v. *Brown*, every federal Circuit to consider such a claim has followed that same objective, common-sense rule, rejecting theories that would review state laws under Article I based upon effects on prospects for election.[7]

Respondents propose to distinguish all these cases, and *Storer* v. *Brown* as well, by labeling all the laws they upheld as "procedural," without offering any definition for that elusive term. *Cf. Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108-09 (1945). If Article I were to prohibit state laws that unequally favor election success, then as *Storer* pointed out, ballot laws reserving places for primary-election winners would be the first to go, for they favor established parties and regularly influence outcomes.

Nor has the specific authorization of state "Manner" regulations in Article I, § 4, ever been confined to a few "general ground rules." S.G. Br. 5. Madison on the contrary actually anticipated that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 FARRAND 241. For that very reason, he explained, the broad override

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[7] See *Joyner* v. *Mofford*, 706 F.2d 1523, 1531 (9th Cir.) ("does not impose a . . . qualification"), *cert. denied*, 464 U.S. 1002 (1983); *Hopfmann* v. *Connolly*, 746 F.2d 97, 103 (1st Cir. 1984) ("the test . . . is whether the candidate 'could be elected if his name were written in'"), *vacated in part on other grounds*, 471 U.S. 459 (1985); *Public Citizen, Inc.* v. *Miller*, 992 F.2d 1548 (11th Cir. 1993), *adopting* 813 F. Supp. 821, 833 (N.D. Ga. 1993) ("cannot be argued seriously"); *accord, Williams* v. *Tucker*, 382 F. Supp. 381, 388 (M.D. Pa. 1976) (three-judge court) ("totally without merit"); *Fowler* v. *Adams*, 315 F. Supp. 592, 595 (M.D. Fla. 1970) (three-judge court) ("no constitutional requirement that the state print anyone's name on the ballot"), *appeal dismissed*, 400 U.S. 986 (1971). State supreme courts hold the same. See USTL Br. 15-17.

power of Congress, also in § 4, was necessary. *Id.* at 240; see also pp. 19-20, *infra*.[8]

D. Respondents' Article I Theory Would Invalidate State Laws This Court Has Approved.

This Court and others for many years have held that States may not just deny advantages, but impose burdens on congressional candidacy, including even removal of candidates from their offices and employment. *Clements* v. *Fashing*, 457 U.S. 957 (1982); cases and statutes cited at USTL Br. 29, 47, 69a-74a. Some States have gone even further, and flatly prohibited the congressional candidacies of thousands of employees. *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973); see also *U.S. Civil Serv. Comm'n* v. *National Ass'n*, 413 U.S. 548 (1973). That they may do so is "settled doctrine." *Wilbur* v. *Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (concurring opinion).

Respondents have no answer to this "settled doctrine" except to observe that the States have a "legitimate interest" in such laws. Th. Br. 48. Of course they do—just as the people of Arkansas did here when they decided to enact Amendment 73. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 471-73 (1991); USTL Br. 19-25; State Br. 18-27. But if Article I, as respondents argue, took away state power that inhibits congressional candidacies, then all those decisions, although correct under the Fourteenth Amendment, were erroneous under Article I, and Hatch-Act-type prohibitions in more than a dozen States would become unconstitutional. See USTL Br. 69a-74a.

E. Amendment 73 Is Not "A Mere Contrivance."

Respondents argue that the actual provisions of Amendment 73 should be ignored as "a mere contrivance," Th. Br. 42, "designed to circumvent," S.G. Br. 23. But the fact remains that § 3 of Amendment 73 does not set term

[8] Several of the original state laws that set property and other requirements specifically stated that they were regulations of "Times, Places and Manner." See USTL Br. 13a, 16a, 17a.

limits.[9] Moreover, the distinction between ballot restrictions and disqualifications is real and is demonstrably significant to voters.[10] "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States* v. *O'Brien*, 391 U.S. 367, 383 (1968); *Arizona* v. *California*, 283 U.S. 423, 455 (1931). There is nothing inappropriate in adopting a less restrictive policy both to attract more support and to prevent claims (however flawed) of an Article I violation—claims which, brushing aside Amendment 73's actual provisions, respondents make anyway.

F. The Record Does Not Support an Assumption That Longtime Officeholders Cannot Win as Write-Ins.

Respondents argue that this Court is bound by the unsupported statement in the Arkansas plurality opinion that established incumbents who campaign to be reelected by write-in have only "glimmers of opportunity." P.C.A. 15a. That would be a total departure from the way this Court has dealt with issues of "constitutional fact" in the past, and also would require rejection of the record as it exists in this case.

1. Facts to make a statute unconstitutional are not assumed. "It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed." *Sweet* v. *Rechel*, 159 U.S. 380, 393 (1895); *accord, e.g., Munn* v. *Illinois*, 94 U.S. 113, 132 (1877). Moreover, "[i]t is . . . difficult to make specific findings about the effects of a voting regulation." *Burson* v. *Freeman*, 112 S. Ct. 1846, 1856 (1992).

[9] The "term limits" in Amendment 73's preamble refer of course to §§ 1 and 2, which are different from § 3 in that they limit the number of terms specified state officials may serve.

[10] For example, in Washington a proposal to limit terms was defeated in 1991, but a ballot restriction was adopted in 1992. Wash. Rev. Code § 29.68.

2. There is very little experience with elections in which established officeholders, rather than fringe candidates, seek election as write-ins. See J.A. 201. "[W]rite-in candidates are longshots more often than not." *Burdick* v. *Takushi*, 112 S. Ct. 2059, 2070 (1992) (Kennedy, J., dissenting). But when the write-in candidate is well known, like former governor Thurmond in 1954, see J.A. 172-73, the experience can be quite different. Respondents dismiss the past write-in election of even a Representative from Arkansas, J.A. 169-70, 201-02, as a fluke attributable to his popular platform. Th. Br. 42. But that is exactly the point: the record is that a popular candidate can succeed by write-in.

3. Respondents say the plurality's unelaborated "glimmers of opportunity" sentence, P.C.A. 15a, reviewing a summary judgment, is a finding of fact that "is not reviewable" by this Court. Th. Br. 40. But it did not purport to be a finding of fact, and even if it had, no state-court factfinding can bind this Court on an issue of federal constitutional law. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 501 n.17 (1984); *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927). Nor could such a factfinding be supported by the record, which on this point contains only, besides some past election results, the unrebutted affidavit of an expert scholar of elections that "[g]iven a choice, any rational candidate would prefer to be a well-known incumbent write-in candidate rather than a political novice who happens to have his or her name printed on the ballot." J.A. 204.[11]

4. Respondents also argue, inconsistently, that "glimmers" was a legal ruling of state law, that "both state courts held that Amendment 73 is a term limits law" and that "[s]tate court interpretations of state law are binding on this Court." Th. Br. 39-40. But what the Arkansas court clearly held was that § 3 of Amendment 73 does not forbid campaigning, election, or service. P.C.A. 15a. Its interpretation of Article I is reviewable.

[11] Respondents suggest that this was disputed by the simple assertion of respondent Thornton that "my ability to be reelected as Congressman depends on my ability to have my name on the . . . ballot." J.A. 163. *But cf. Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986).

5. No one is contending that a candidate whose name is not on the ballot has as easy a time as one whose name is printed there. No one is denying that Amendment 73 was intended to withhold one substantial advantage among the many that longtime incumbents already enjoy—yet without precluding their election if the voters really want them back. But respondents are asking this Court to rule as a matter of law that even a longtime incumbent has no significant opportunity to win by write-in. This Court has never so held. Fourteenth Amendment decisions have weighed a State's election system as a whole, including the availability or not of write-in. In some cases it met First and Fourteenth Amendment standards, in some it did not. *Compare Anderson* v. *Celebrezze, supra,* 460 U.S. at 799 n.26, *with Jenness* v. *Fortson*, 403 U.S. 431, 434, 438 (1971), *and Storer* v. *Brown, supra*, 415 U.S. at 736 n.7. And such Fourteenth Amendment judgments, this Court has held, are not to be made *a priori*, but depend on proper findings of fact. *Mandel* v. *Bradley*, 432 U.S. 173, 178 (1977); *Storer* v. *Brown, supra*, 415 U.S. at 740, 742.

G. Amendment 73 Does Not Deny the Right To Vote.

The Solicitor General, citing as textual support Article I, § 2's provision that the House shall be "chosen . . . by the People," argues that "Amendment 73 is unconstitutional because it impairs the right of the voters of Arkansas to elect candidates of their choice." S.G. Br. 15. He turns § 2 on its head, for here the people did choose. See pp. 18-19, *infra*. Voters remain free to cast their votes for longtime officeholders, and to have those votes counted equally, which is what Article I requires. Moreover, the right to vote is not a right to vote for a particular candidate, see *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974), and it is not a right to prevail. See, *e.g.*, *United States* v. *Classic*, 313 U.S. 299, 318 (1941); see also *Lassiter, supra*, 360 U.S. at 51. If, as the Solicitor General ar-

gues, the right to vote were denied simply by not printing a candidate's name on the ballot, then state primary-election laws would be unconstitutional.[12]

II. CONGRESS CAN REJECT AMENDMENT 73.

Respondents never deal with the fact that Congress—the very body assigned by the Constitution to oversee the congressional election laws enacted by the States—has apparently concluded that Amendment 73 does not pose a threat to national interests. Respondents acknowledge that Congress under Article I, § 4, has "extraordinary," Th. Br. 4, power to invalidate Amendment 73 any time it wants to. That, the Solicitor General says, was indeed the whole purpose of § 4. S.G. Br. 5, 17-18. Yet although Amendment 73 and laws like it have been on the books now for over two years, Congress has done nothing to override it. Neither respondent Thornton nor anyone else has even introduced a bill to do so.[13]

Courts could with comprehensible standards invalidate a state law that, for example, sought to alter the minimum age requirements of §§ 2 and 3 of Article I, or to deny an equal vote. *E.g.*, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964). But when respondents ask to interpret the structural assignments of power in Article I according to "essential democratic principles" and predictions of election outcomes, they move very far from "judicially discoverable and manageable standards," especially in light of § 4's "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Nixon* v. *United States*, 113 S. Ct. 732, 735 (1993), *quoting Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Even assuming justiciability, this Court has rejected "standards which would require us to equate our

[12] The Solicitor General also argues that Amendment 73 violates Article I because it "creat[es] voter confusion by misleading voters as to the identity of legitimate candidates." S.G. Br. 26. But all laws excluding anyone from the ballot would fail that test.

[13] *Cf. Ex parte Siebold*, 100 U.S. 371, 388 (1880): "The State laws [governing congressional elections] which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress."

political judgment with that of Congress." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 590 (1952); *cf. Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979).

III. THE STATES DO NOT REQUIRE A FEDERAL GRANT OF POWER.

Respondents propose a profound departure from how the Constitution has been understood: they argue that "only an express delegation of authority could allow the States to limit the length of service for members of the national legislature." Th. Br. 11; see also P.C.A. 12a. That is not correct. The federal government is one of enumerated powers. But unless constitutionally prohibited, the States do not require a grant of power to legislate on this or any other subject. *Gregory* v. *Ashcroft*, *supra*, 501 U.S. at 457. That is what the Tenth Amendment confirms.

So respondents urge that the Tenth Amendment now be reread, unlike the rest of the Constitution, as frozen in time—to reserve to the States only powers that existed prior to adoption of the Constitution. Hill Br. 39-40; S.G. Br. 26-27. But no decision of this Court has ever suggested such a thing, and respondents do not respond at all to petitioners' discussion that (1) the Tenth Amendment does not say that; (2) the States had traditionally imposed numerous restrictions—including term limits—on their representatives in the Confederation Congress; and (3) the Tenth Amendment at the least certainly reserves powers not excluded as of its adoption date—which is not 1789, but 1791. See USTL Br. 14 n.17.

IV. RESPONDENTS HAVE NOT MET THE BURDEN TO DEMONSTRATE A CLEAR CONSTITUTIONAL PROHIBITION OF STATE QUALIFICATIONS.

State laws are presumed constitutional, and "the burden of showing a statute to be unconstitutional is on the challenging party, *not* on the party defending the statute." *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 17 (1988) (emphasis in original). Reacting perhaps to the burden they bear, the absence of textual support, the ambiguity of discussions, and the widespread

early practice that utterly negates their contentions, respondents repeatedly describe the chain of inferences they propose as "clear," Th. Br. 5, "clear beyond a reasonable doubt," Hill Br. 12, and any other conclusion as "simply inconceivable," Th. Br. 30. Yet surely, if the many briefs filed in this case demonstrate anything, it is that any implied constitutional prohibition of state laws adding disqualifications (which, as earlier emphasized, Amendment 73 is not) would be at best far from clear or inevitable. Jefferson called it "one of the doubtful questions," 11 WORKS 380, and even the three opinions of the Arkansas majority respectively described the issue as "inconclusive," P.C.A. 12a, "a close question," P.C.A. 26a, and "not definitively and categorically settled," P.C.A. 41a. Although respondents propose inferences and surmises, they have come up with no statement of the Framers—not one—providing unambiguous support for their position.

A. *Powell* v. *McCormack* Declined To Adopt Respondents' Theory.

The significant passage in *Powell* v. *McCormack* is the one respondents all ignore. Presented with the *very argument* that the minimum qualifications listed in Article I by negative implication barred enactment of any others, this Court *expressly declined* to accept it:

> "Relying heavily on Charles Warren's analysis of the Convention debates, petitioners argue that the proceedings manifest the Framers' unequivocal intention to deny either branch of Congress the authority to add to or otherwise vary the membership qualifications expressly set forth in the Constitution. *We do not completely agree, for the debates are subject to other interpretations.*"

395 U.S. 486, 532 (1969) (footnote omitted; emphasis supplied).[14] *Powell* held that if the word "Qualifications" in Article I, § 5, were not defined as qualification provi-

[14] Even the observations by Mr. Warren concerned only "power *in Congress* to fix qualifications," in the limited context of Article I, § 5. C. WARREN, THE MAKING OF THE CONSTITUTION 420, 422 (1928) (emphasis supplied).

sions specified in the Constitution, and a single House sitting as "Judge" could add other requirements as well, then the distinction in § 5 between the power to exclude (by majority vote) and the power to expel (by two-thirds vote) would collapse; exclusion without limiting standards was "too important to be exercised by a bare majority." 395 U.S. at 536, *quoting* 2 FARRAND 254 (Madison).[15]

B. The Minimum Qualifications of Article I Did Not by Negative Implication Prohibit All Others.

Respondents argue that by "implication" and the old and unreliable maxim of *expressio unius est exclusio alterius*, *cf. Ford* v. *United States*, 273 U.S. 593, 612 (1927), Article I's minimum requirements should silently exclude all others. Hill Br. 2, 13 n.21, 24 n.52. But "the business of negative implication is slippery," *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 418 (1946), particularly as to state power. Here it has many difficulties:

1. The proposition that the listings in §§ 2 and 3 were intended to be exclusive is immediately undercut by the fact that the Constitution itself contains other qualification provisions, as the Solicitor General recognizes. S.G. Br. 7 n.4; see *Powell*, 395 U.S. at 520 n.41.

2. Language to make the listed minimums exclusive was in the original draft of the Committee on Detail, but was deleted. See 2 FARRAND 137 n.6, 139; USTL Br. 39. Respondents ask the Court to accept their unsupported speculation, contrary to all usual rules of construction, that this was inadvertent or because it was superfluous,

[15] Repeated statements to the effect that "every federal and state court that has considered the issue" agrees with respondents, Hill Br. 26, 4, 27, Th. Br. 37 n.35, are seriously in error. Besides the cases cited at USTL Br.47 n.69, see *Lukens* v. *Brown*, 368 F. Supp. 1340 (S.D. Ohio 1974) (three-judge court) (disqualification for failure to file accounting); *Secretary of State* v. *McGucken*, 244 Md. 70, 222 A.2d 693 (1966) (requirement to appoint treasurer). Many cases also uphold state ballot-access laws; see p. 5, *supra*.

rather than because it was rejected. Th. Br. 22 n.22; Hill Br. 14.[16]

3. Petitioners pointed out that Hamilton's comment that the qualifications were "fixed" could not mean fixed from change by the States, because the qualifications of voters—which he said were "fixed" also—are by the first clause of Article I, § 2, left entirely up to the States to determine. USTL Br. 43. The Solicitor General's response is that Hamilton was mistaken. S.G. Br. 21 n.13. But Madison said the same thing. 2 FARRAND 249-50; see USTL Br. 43.

4. Respondents ignore the many decisions holding that constitutional provisions will not normally be interpreted as silently preempting state power. See *Goldstein* v. *California*, 412 U.S. 546 (1973); FEDERALIST No. 32; cases at USTL Br. 32-35. There is a presumption against preemption of state power by statute, also. *E.g.*, *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 605 (1991); *New York State Dep't* v. *Dublino*, 413 U.S. 405, 413 (1973).

5. Similar constitutional provisions are not freighted with negative implications. Article I, § 2, provides that Representatives are to be chosen "by the People of the several States;" nevertheless States (even before Congress required it) could restrict voters to voting in districts for a single candidate. *McPherson* v. *Blacker*, 146 U.S. 1, 26 (1892). Article II, § 1, lists qualifications for Presidential electors; but States from the beginning added property and district residency requirements as well. See USTL Br. 38, 19a-24a. Article III, § 1, authorizes establishment of inferior federal courts; yet that does not prohibit inferior federal courts existing entirely outside Article III. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985). By assigning "the judicial Power of the United States" to federal courts, Article III does not thereby

[16] There could also have been a decision not to address the issue by the 1787 "masters of compromise," *U.S. Dep't of Commerce* v. *Montana*, 112 S. Ct. 1415, 1429 (1992), who did not attempt to resolve all uncertainties in the Constitution.

exclude state courts from concurrent jurisdiction; to read it otherwise, Hamilton admonished, "would amount to an alienation of State power by implication." FEDERALIST No. 82 at 554. Article III, § 2, guarantees jury trials in criminal cases; the argument that by *expressio unius* civil juries were denied, Hamilton called "inapplicable to a constitution of government." FEDERALIST No. 83 at 560. *Cf.* also 28 U.S.C. § 44(c) (residency qualification for Circuit Judges).

6. Respondents also argue that the minimums listed in Article I are so comprehensive that they silently occupied the field, and exclude state qualifications. Hill Br. 39; Th. Br. 6, 7, 10. But it was *the States* to which Article I left the "field" of regulating congressional elections, an important check on federal authority, *Garcia* v. *San Antonio M.T.A.*, 469 U.S. 528, 551 (1985), as to which there is "not the slightest difficulty" in States' legislating. *Ex parte Siebold*, 100 U.S. 371, 384 (1880). If the minimum qualifications occupied any field at all, it would more reasonably be described as legislation on the subjects they address: age, citizenship or residency. There were "no qualifications *required* except those of age and residence." 3 ELLIOT 8 (Nicholas) (emphasis supplied).

7. Respondents repeatedly stress that the Framers did not require national term limits in the Constitution. Hill Br. 11; Th. Br. 5. But of course there is a world of difference between what the Constitution does not require, and what it prohibits:

> "[S]ubtleties almost too contemptible for refutation have been adopted to countenance the surmise that a thing, which is only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*."

FEDERALIST No. 83 at 558 (Hamilton) (emphasis in original).[17]

[17] That States did not themselves include term limits in the qualifications they added reflects simply that "rotation" was contro-

C. Original Laws Reflect Original Understanding.

The Solicitor General dismisses in a footnote the only unambiguous evidence—the States' contemporaneous enactments adding qualifications—calling them "not reliable indicators." S.G. Br. 16 n.11.[18] One respondent (also in footnote) proposes a rule that "it is only the actions of the First Congress, not those of early state legislatures," that count, Th. Br. 33 n.30—even though Congress, which could have disallowed such laws, never did so. Other respondents simply say the state laws "were indeed unconstitutional" and call them "mistakes." Hill Br. 20. Remarkably, eight of the thirteen original States, they say, forgot about the Constitution. *Id.*; see USTL Br. 8a-18a.[19]

The First Congress—whose actions respondents do concede are significant, Th. Br. 33 n.30—passed laws

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versial, and any State that went that way alone might disadvantage itself; hence the complaints that the Constitution did not make term limits national. *Cf. Ex parte Yarbrough*, 110 U.S. 651, 660-61 (1884) (districts). Several state laws on congressional incumbency do not take effect until a stated number of other States adopt similar provisions. *E.g.*, Wash. Laws of 1993, ch. 1, § 8; Mo. Const., art. III, § 45(a); Nev. Const., art. II, § 10.4; Alaska Stat. § 15.30.130(a).

[18] *But see McPherson* v. *Blacker*, *supra*, 146 U.S. at 27: "Certainly plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their position as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force . . . ."

[19] Citing no authority, respondents speculate that when Virginia a quarter-century later repealed property and district-residency requirements, it might have acted from constitutional doubts. Hill Br. 19. History shows on the contrary that property tests of all kinds began to be eliminated during those years as a more egalitarian era dawned. See C. WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY 1760-1860 182-207 (1960); Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 358 (1989). Respondents produce no evidence that anyone ever questioned state power to enact these laws until a partisan seating dispute arose in 1807, which ended inconclusively. After the seating dispute, Maryland passed a statute remaining in effect until 1896 that required its Senators be chosen one from each shore. Md. Act of Jan. 6, 1810, ch. 22, § 2.

that disqualified for various offenses. Representative Madison of Virginia voted for them. See USTL Br. 30-32. Respondents are driven to argue that those laws did not mean what they said, and that those legislators must have had in mind an exception for Senators and Representatives, Hill Br. 23, even though such was never mentioned.[20]

D. Expectations.

Respondents observe, apparently with dismay, that if States can bar longtime officeholders from the ballot, then States can bar convicted felons, too. Hill Br. 33. Would exclusion of felons really have horrified the Framers and ratifiers? On the contrary, surely they would have recoiled instead from any suggestion that the new Constitution had *sub silentio* decreed the opposite. In fact, a reason Jefferson concluded state-enacted qualifications logically must be permissible, was that otherwise one would be driven to the absurd (he thought) conclusion that States could not disqualify "a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime."[21]

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[20] One respondent refers to a dictum in *Burton* v. *United States*, 202 U.S. 344, 369-70 (1906), to the effect that Senators did not hold office under the United States, and construing a much later statute. Tr. Br. 32. But if "any office of honour, trust or profit under the United States," 1 Stat. 117, was meant to exempt Members of Congress, then the prohibition in Article VI of religious tests for "any Office or public Trust under the United States" did not apply to Congress, either, nor would the impeachment punishment in Article I, § 3, prevent service in Congress. See also E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 33-34 (1957).

[21] 11 WORKS OF THOMAS JEFFERSON 380 (P. Ford ed. 1905). Respondents accurately point out that Jefferson (like Justice Story) could make mistakes, and that he was in Paris in 1787. Hill Br. 21; Th. Br. 25 n.25. Joseph Story that year was in Marblehead, Massachusetts and was eight years old. Jefferson's analysis was sufficiently compelling for Story to try to deal with it. See 2 J. STORY, COMMENTARIES § 624 (1833). Brilliant as he was, Justice Story was far from a neutral observer on issues of state power. See G. WHITE, 3 HISTORY OF THE SUPREME COURT 100-05 (1988).

At the ratifying conventions, the new Constitution was attacked relentlessly for encroachments on the States; yet respondents point to no one at all who complained that Article 1 by implication would prevent States from regulating qualifications.[22] Delegates were deeply upset by the controversial grant of power to Congress in Article I, § 4, to override state election laws. See Th. Br. 45. One may imagine their consternation had they believed that the new Constitution would already be doing so: that it not only omitted a "rotation" requirement, but, without bothering to say so, also terminated each State's power to enact one for itself—or to enact property requirements, or district residency requirements, or bans on felons or lunatics, or the many other subjects of state election legislation. Had they believed the Constitution meant that, one may well doubt whether the Constitution —whose ratification was a close-run thing—would have carried at all.

V. THE CONSTITUTION AFFIRMATIVELY GRANTS POWER.

A. Article I, § 2, and the Seventeenth Amendment Broadly Grant Power.

Amendment 73 was adopted directly by the voters of Arkansas themselves. Their power to do so has a separate source in Article I, § 2, which provides for Representatives to be "chosen" every second year "by the People of the several States"—*i.e.*, the people within each State. USTL Br. 46 n.65. "[C]hosen" is not limited to general elections. *United States* v. *Classic*, *supra*. The people of Arkansas chose here. They can choose again, whenever they vote for candidates (no candidate is disqualified), as well as whenever they may decide by simple majority to revoke Amendment 73. See Ark. Const., amend. 7; USTL Br. 46; MSLF Br. 5-10. The allocation

[22] The complaint in a ratifying convention that respondents quote, Hill Br. 17 n.28, that "there is no controul left in the state governments," referred only to Congress' taxing power. 3 THE COMPLETE ANTI-FEDERALIST 162. In fact, it later complained that Congress could use its § 4 power to control the results of elections. *Id.* at 163.

to the people of each State of power to choose the House was at the heart of this Court's decision in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

Respondents, to explain away this distinctive fact that the people chose, argue that the people of the State as a whole cannot bind the election choices of every district (even though Amendment 73 overwhelmingly won in every district). Th. Br. 49-50; S.G. Br. 15-16. But besides ignoring the Senate, that amounts to saying that the Constitution requires House voting by districts, which plainly it does not. See *Wesberry* v. *Sanders*, *supra*, 376 U.S. at 8. Moreover, Article I, § 2, even without the initiative aspect present here, is a separate grant of state power even to legislatures. *United States* v. *Classic*, *supra*, 313 U.S. at 311, 315; USTL Br. 8.

B. Article I, § 4, Broadly Grants Power.

The Solicitor General proposes a syllogism that (1) any state power to adopt Amendment 73 must come from § 4, which is also the source of power for Congress; (2) § 4 does not empower Congress to add qualifications; (3) therefore the States cannot do so, either. S.G. Br. 21-22.[23]

The first premise is incorrect because there is no logical imperative that state and congressional power be identical. Doubts expressed about Congress setting its own qualifications do not apply to the States, USTL Br. 39, and the States do not require § 4 as a source of power: Arkansas and its people have constitutional power in addition under both Article I, § 2, and the Tenth Amendment. Section 4 was needed, however, to permit Congress to exercise any power at all.[24]

[23] The Solicitor General is mistaken when he suggests that petitioners rely solely on § 4, or that they would agree that it did not grant congressional power. On the contrary, see USTL Br. 5, 8-14, 30-38, 44-46. Although doubted by some at the Convention, Congress' power has been exercised since 1789 and is identified in *Buckley* v. *Valeo* and not excluded in *Powell*. See pp. 12, 16-17, *supra*.

[24] Madison described Article I as "leav[ing]" regulation of elections to the States, subject to Congress. 3 ELLIOT 367. See also

The second premise also is incorrect. Section 4's "words of great latitude," 2 FARRAND 240, allowed laws "comprehensive and complete." *United States* v. *Gradwell*, 243 U.S. 476, 483 (1917); see also USTL Br. 8-11. "The truth of the matter is that no limits were discerned in the authority granted," "the almost limitless power which practically everyone assumed Congress had been granted." Paschal, *The House of Representatives*, 17 LAW & CONTEMP. PROB. 276, 280, 283-84 (1952). See also *Buckley* v. *Valeo*, 424 U.S. 1, 13, 133 (1976) (suggesting § 4 as source of any congressional power to add qualifications).

As applied to Congress, however, the broad grant of power in § 4 is constrained by limitations that do not affect Amendment 73. For instance, an act of Congress that barred reelection of longtime incumbents would risk violating the guarantee of Article I, § 2, and the Seventeenth Amendment that it is the people of each State who choose their representatives, as well as the Tenth Amendment protections of federalism recognized in *Gregory* v. *Ashcroft*, *supra*, *and New York* v. *United States*, 112 S. Ct. 2408, 2418 (1992). See USTL Br. 45-46. In any First and Fifth Amendment challenge, the interest of Congress in restricting State choice could be less compelling than that of the people of a State themselves in making their own decision about how their representatives should be elected.[26] Although abundant historical practice supports Congress' power to add disqualifications, the limitations on congressional power are not at issue here.

CONCLUSION

The judgment should be reversed.

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id. 10 (Nicholas): "the powers vested by this plan in Congress are taken from the state legislatures" instead of being "left solely to the states." Even if § 4 were the only grant of state power, there would be two possibilities: either § 4 assigned only part of the election power, in which case the balance, under the Tenth Amendment, remained with the States; or § 4 fully disposed of the election power, thus assigning all to the States in the first instance, with all also subject to Congress. Either way, Amendment 73 would be constitutionally authorized.

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November 16, 1994